APPEAL NO. 93386

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq.* (Vernon Supp. 1993) (1989 Act). On April 21, 1993, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The issues presented and agreed upon were: 1) Whether claimant sustained an injury within the course and scope of her employment; 2) whether claimant sustained disability as a result of such injury; and 3) claimant's correct average weekly wage (AWW). The hearing officer determined that claimant was injured within the course and scope of her employment, has had disability since October 22, 1992 and that claimant's AWW is $500.50.

Appellant's, carrier herein, "request for appeal" only contests the findings and conclusions regarding the AWW and requests that we reverse the hearing officer's decision to hold that claimant's AWW is $254.46, or remand for additional evidence regarding the wage rate. Respondent, claimant herein, filed a response to carrier's appeal and requests we affirm the decision.

DECISION

The decision of the hearing officer is affirmed.

Claimant testified that in October 1992 she was employed as a fire/safety guard with (employer) working at a refinery. Her job duties were to monitor air quality in the vicinity of welding and other similarly hazardous operations and to advise workers if air quality required evacuation. Claimant testified that on (date of injury), welders on a pipe started a fire which gave off a hydrogen sulfide smoke. Claimant, who had suffered from an asthmatic condition for a number of years, was hospitalized for smoke inhalation. The bulk of the CCH concerned the circumstances of whether claimant could have gotten close enough to the fire to have inhaled smoke and whether claimant's preexisting lung condition was the cause of her present condition. Although the bulk of the CCH dealt with those issues the hearing officer resolved them largely in favor of the claimant. In that neither the circumstances of the accident nor claimant's medical condition were appealed we will not discuss them further and will only consider the appealed issue of the AWW.

Claimant testified that she was hired to work twelve hours a day, seven days a week, on a temporary basis during which the refinery "was doing a shut down job" which required work around the clock until the job was completed. Claimant stated she earned $7.00 an hour plus time and a half for hours worked over 40 hours per week. Claimant's testimony and her wage statement reflect that the first week she worked (the week of 9-21-92 to 9-27-92), she worked two days for a total of 16 hours, and the second week she worked (the week of 9-28-92 to 10-4-92) she worked only one day for a total of 7½ hours. Claimant testified the first two weeks of her employment were devoted to training. During the third week (the week of 10-5-92 to 10-11-92) the wage statement shows claimant worked four days for a total of 35½ hours. Claimant testified she was unable to work a full week

because of an incident at work which cause her to be hospitalized briefly for anxiety due to an event she had witnessed. During the fourth week (the week of 10-12-92 to 10-18-92) claimant worked five days for a total of 61 hours. Claimant testified her hours had been reduced that week because she had some car problems. It was during the fifth week (10-19-92 to 10-25-92) when she worked three days for a total of 31 hours that she was injured. Since claimant had not worked for the employer for 13 weeks, the carrier submitted the name and wage statement of (DW), an employee who was also a fire/safety guard with the same job duties, as a "similar employee." Claimant argues DW was not a similar employee, although doing the same work and paid the same hourly rate as claimant, because DW was a permanent (as opposed to claimant being a temporary) employee who regularly worked a 40 hour week. Claimant emphasized she was hired to work 84 hours a week and her only choice as to her hours was whether to work the day shift or the night shift. The hearing officer in her discussion on this point conceded that both claimant and DW were fire/safety guards and had identical job descriptions but stated:

> . . . when deciding whether employees provide similar services, the Hearing Officer is not limited to examining the job functions of the employees, but must also consider whether the employees worked a similar number of hours per week. Although the number of hours per week need not be identical, it must be similar in order for persons with similar job descriptions to be considered similar employees. In the case at bar, it is clear that [DW] did not work more than forty hours per week in the thirteen weeks preceding Claimant's injury; it is also clear that during the only week that the Claimant worked a full schedule, she worked sixty-one hours.

The hearing officer, in pertinent part, found:

FINDINGS OF FACT

6.Claimant was employed as a temporary fire guard at [employer].

7.[DW] was employed as a permanent fire guard at [employer].

8.Claimant was employed to work more than forty hours per week.

9.[DW] was employed to work up to forty hours per week.

10.Claimant and [DW] were not similar employees and did not provide similar services to [employer].

11.It would be just, fair, and reasonable for a temporary fire guard in County, Texas to earn $7.00 per hour, and to be paid time and one half for time worked

over forty hours per week.

12.It would be just, fair and reasonable for a temporary fire guard in County, Texas to work sixty-one hours per week.

CONCLUSIONS OF LAW

5.Claimant's average weekly wage is $550.50.

Carrier's appeal is based on "the use of the just, fair, and reasonable method" of determining the AWW "as being premature and improper," relying on Texas Employers' Insurance Association v. Ford, 271 S.W.2d 397 (Tex. 1954) and Aetna Insurance Co. v. Giddens, 476 S.W.2d 664 (Tex. 1972), for the proposition that "[i]n workers' compensation cases, the burden is on the claimant to prove the applicable wage rate by competent evidence." Carrier also alleges the finding of an AWW of $500.50 is against the great weight of the evidence.

The parties appear to agree that the AWW is computed in accordance with Article 8308-4.10 which states, in pertinent part:

(a). . . if the employee has worked for the employer for at least 13 consecutive weeks immediately preceding the injury, the average weekly wage of an employee shall be computed as of the date of the injury and equals the sum of the wages paid in the 13 consecutive weeks immediately preceding the injury divided by 13.

(b)If the employee has worked for the employer for fewer than 13 weeks immediately preceding the injury or if the wage at the time of injury has been fixed or cannot be determined the average weekly wage equals the usual wage that the employer pays a similar employee for similar services. If no such employee exists, then the average weekly wage equals the usual wage paid in that vicinity for the same or similar services provided for remuneration.

(g)If the methods adopted under Subsections (a) and (b) of this section cannot be applied reasonably due to the irregularity of the employment or if the employee has lost time from work during said 13-week period due to illness, weather, or other cause beyond the control of the employee, the commission may determine the employee's average weekly wage by any method that it considers fair, just, and reasonable to all parties and consistent with the methods established under this section.

Carrier points out that the calculation of the AWW under the "old" Workers' Compensation Act (before the effective date of the 1989 Act) Article 8309 § 1(1-3) Tex. Rev. Civ. Stat. (Vernon Supp. 1990) (repealed 1991) is essentially similar to the 1989 Act provisions quoted above. Carrier makes a distinction that the 1989 Act has a two-step process in section 4.10(b), both of which must be met before one goes to the fair, just, and reasonable provision of section 4.10(g). The two step process in section 4.10(b) says that if an employee has worked for the employer for fewer than 13 weeks immediately preceding the injury, and it is undisputed that claimant fits in this category, the average weekly wage "equals the usual wage that the employer pays a similar employee for similar services. If no such employee exists then the average weekly wage equals the usual wage paid in that vicinity for the same or similar services . . . ." (Emphasis added). It is carrier's argument that before the fair, just, and reasonable provision of section 4.10(g) can be used ". . . the claimant must prove that the first three methods of computation (section 4.10(a) and two steps of 4.10(b)) are not applicable," citing Ford, *supra* and Giddens, *supra*.

We agree that the case law prior to the 1989 Act placed the burden on the claimant to prove that there was not a same or similar employee as the claimant, before the employee could avail him or herself of the fair, just and reasonable provision. We note, however, the current law has been interpreted by agency rule, which is generally regarded as having the force and effect of law. 2 TEX. JUR. 3rd Administrative Law, Sec, 19 (1979). Texas W.C. Comm'n 28 TEX. ADMIN. CODE § § 128.2 and 128.3 (Rules 128.2 and 128.3) are the rules which generally interpret the sections of Article 8308-4.10 with which we are dealing. We note that in discussing an employer's duty to file a signed wage statement with the carrier and the Commission, Rule 128.2(b)(4) states:

> (4)If the employee was not employed for 13 continuous weeks before the date of injury, the employer shall identify a similar employee performing similar services, as those terms are defined in §128.3 of this title (relating to Average Weekly Wage Calculation For All Employees), and list the wages of that similar employee for the 13 weeks prior to the date of injury . . . . (Emphasis added.)

We have interpreted this rule as placing "the responsibility on the employer to identify a `similar employee performing similar services.'" Texas Workers' Compensation Commission Appeal No. 92238, decided July 22, 1992 and Texas Workers' Compensation Commission Appeal No. 92037, decided March 19, 1992. Rule 128.3(e) discusses the provisions found in Article 8308-4.10(b) regarding someone in "that vicinity for the same or similar services" by saying:

> If there is no similar employee at the employer's business, the calculation is based on wages paid to a similar employee who performed similar services in the same vicinity, for at least 13 weeks. When a similar employee is identified,

> the wages paid to that person for the 13 weeks immediately preceding the injury are added together, and divided by 13. The quotient is the average weekly wage for the injured employee.

We read this rule in conjunction with Rule 128.2(b)(4) which places the burden on the employer (and ultimately the carrier) to identify a similar employee who performed similar services in the same vicinity. The Commission presumably believed the carrier is much more able to meet this burden than is the claimant. Employer, as required by Rule 128.2(b)(4) has identified what carrier believes is a similar employee performing similar services, DW. The hearing officer in applying Rule 128.3(f)(2) which defines "similar services" to include tasks "that are comparable in the number of hours normally worked," stated:

However, when deciding whether employees provide similar services, the Hearing
> Officer is not limited to examining the job functions of the employees, but must also consider whether the employees worked a similar number of hours per week. Although the number of hours per week need not be identical, it must be similar in order for persons with similar job descriptions to be considered similar employees.

We find that the hearing officer correctly restated Rule 128.3(f)(2). Based on the fact that the number of hours DW worked were not comparable to those of claimant the hearing officer found claimant and DW were not similar employees and did not provide similar services to the employer. In Texas Workers' Compensation Commission Appeal No. 92073, decided April 6, 1992, we held "Rule 128.3(f)(2) specifically states that similar services are those which are, among other things, comparable to the number of hours normally worked by the injured employee. Thus, while the hours need not be identical, they must be comparable." No evidence was submitted by the carrier, or employer, regarding "a similar employee who performed similar services in the same vicinity, for at least 13 weeks." Rule 128.3(e), quoted previously. Therefore, the provisions of Article 8308-4.10(g) and Rule 128.3(g) were properly applied. We find no error in the hearing officer's determination on this point.

Carrier also contends that the finding of AWW of $500.50 "is against the great weight of the evidence" and is not "a fair, just and reasonable method" to determine claimant's AWW. We have held that the hearing officer has the discretion to apply any fair, just, and reasonable method to calculate AWW where the wage rate was not determinable through the use of actual wages or the wages of another employee in the same or similar employment. Texas Workers' Compensation Commission Appeal No. 92485, decided October 23, 1992. Courts have held that a "just, and fair" wage "is not a matter of mathematical calculation," but must be established by the fact finder on due consideration of all the facts and circumstances present in the case. Barrientos v. Texas Employers

Insurance Association, 507 S.W.2d 900 (Tex. Civ. App. - Amarillo 1974, writ ref'd n.r.e.). Although we might have computed a "fair, just and reasonable" AWW in another manner, we cannot conclude, as a matter of law, that the hearing officer abused her discretion by deciding it was "plausible to infer that claimant would have continued to work sixty-one hour weeks . . . ." Based upon our review of the record, we do not find that the hearing officer's calculation of the AWW to be unfair, unjust, or unreasonable, nor an abuse of discretion on the part of the hearing officer.

Accordingly, we affirm the decision and order of the hearing officer.

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Thomas A. Knapp
Appeals Judge

CONCUR:

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Lynda H. Nesenholtz
Appeals Judge

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Gary L. Kilgore
Appeals Judge